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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 382-383 October Term, 1947.

JESSIE L. O'DANIEL,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,
Respondent,

JESSIE L. O'DANIEL, Executrix of the Will of WILLIAM BRYAN O'DANIEL, deceased,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner files this Reply Brief for the purpose of correcting the mistaken statements and inferences of fact and erroneous references to principles of law contained in Respondent's Brief in Opposition to the Petition for Certiorari.

MISTAKES OF STATEMENT.

(1)

Respondent's Reply Brief, bottom of page 3 states:

> "There was *no evidence* that O'Daniel, in his diagonal run across the driveway to the southeast corner of the station building, *was visible* to any member of the train *crew*, nor was there any evidence that any of the crew *was in a position to see him* when the signal to start the train was given by sounding the starting whistle, *which is done either from the platform or from the inside of the car*. When the starting whistle sounded O'Daniel had just reached the south edge of the station platform (R. 14a)."

The civil engineer, James J. Boyd, testified that the entire space between the curb at the Pennsylvania Building on Cricket Avenue, from which point the Decedent ran diagonally toward the South curb of the station platform, and the width of the platform over which he moved in a direct line toward the train standing at rest, were all unobstructed to the full view of the train crew (8a).

> "Q. Is there a driveway running south on the edge of the platform?

A. Yes, there is a driveway paralleling, which connects with Cricket Avenue and Anderson Avenue.

Q. How wide is that driveway?

* * * * * * *

THE WITNESS: The total width across there is 73 feet.

BY MR. WRIGHT:

Q. Is that driveway in between the platform and the other side of the driveway, it is unobstructed?

A. That is right."

Mr. Boyd further testifies as follows (9a):

"Q. Can you give us the distance from the platform at the east end of the station to the end of the platform?

THE COURT: East end of station to east end of platform?

MR. WRIGHT: Yes, that is right.

THE WITNESS: That is on the Philadelphia end of the platform, 97 feet."

On pages 10a and 11a, he says:

"Q. Is that all unobstructed?

A. Yes, sir, with the exception of the supporting colums for the overhead canopy, or roof.

Q. How much are those columns?

A. Approximately six inches through.

* * * * * * *

Q. Mr. Boyd, from the south side of the platform across the driveway to the pavement surrounding the bank building there, what is that distance?

A. The right angle distance or the diagonal distance from the corner of the station.

Q. The diagonal distance.

MR. PRICE: The diagonal distance to what point?
THE COURT: The south side of the platform.
MR. WRIGHT: To the curb of the Pennsylvania Building there, the bank building.
MR. PRICE: He said at right angles. I want to know what point he is starting at to begin the diagonal.
THE WITNESS: From the corner of the sidewalk, that is the radius curb at the Pennsylvania Building, heading in a northeasterly direction to the Philadelphia end of the waiting room, to the curb in that vicinity, that is diagonally across the street.
BY THE COURT:
Q. How far is that?
A. That is 91 feet."

The witness, Miss Vaux, testified as follows (17a):

"Q. Miss Vaux, is there not a clear and an unobstructed view of the platform at Ardmore station from the platform?
A. You mean from the train ——
Q. From the edge of the platform to the edge of the platform where the rail is?
A. Oh, yes."

This evidence is conclusive the trainmen must have seen the Decedent traversing the whole open space from the time he entered the railroad premises, following the direct path which all intending passengers take from Cricket Avenue to a standing train at the station. It is respectfully suggested that on the question of Respondent's negligence it is the province alone of the jury to find whether the trainmen did not look for either approaching or standing passengers before giving the signal; or, seeing Decedent approaching the train, gave the signal in disregard of their duty; or, seeing him standing beside the train, started it; and particularly, whether, under all of the circumstances, Respondent

owed to the Decedent, as an intending passenger, any duty under tests as defined by the Court's instructions to it.

The record is barren of any evidence warranting Respondent's statement that: "The starting whistle, which is done either from the platform or from the inside of the car". It is suggested the manner of giving the starting signal is immaterial; but the conclusion is irrefutable that the whistle was sounded with the Decedent, as an intending passenger, in full unobstructed view of the crew, *when he was only twenty (20) feet from the standing train and that it was started while he was standing along side of the train only ten (10) feet from the car steps;* and that Respondent's violation of its duty to Decedent could be found by the jury under proper instructions by the Court.

(2)

Respondent says in the same paragraph at the bottom of page three of its Reply Brief:

> "The station building, from behind which O'Daniel *suddenly emerged on the south edge of the station platform just as the starting whistle sounded, was 48 feet long* (R. 9a) *and effectively screened him from anyone standing beside the train on the north side of the platform.*"

The Decedent did not suddenly come from behind the station building, nor could it screen him from the trainmen if standing along the North side of the station platform. The station building is only forty-eight (48) feet in length, but the station platform where passengers boarded the train is three hundred and thirty (330) feet long, and the distance from the East end of the station building to the East end of the station platform is ninety-seven (97) feet.

The testimony of the civil engineer, James J. Boyd, as to

the length of the station building and of the station platform follows (7a and 9a):

"Q. Will you tell me the length of the station platform?

A. Do you want the length in accordance with this plan? That is what you want?

* * * * * * *

THE WITNESS: 330 feet."

"BY THE COURT:

Q. What is the length and width of the station?

* * * * * * *

A. Forty-eight by nine and a half."

The Decedent approached the standing train from the curb at the end of the Pennsylvania Building, not in a straight line, but in a *diagonal* line; and, therefore, could not have suddenly appeared from behind the station building, but must have been in full view of the trainmen, if looking in the direction from which passengers approach to board the train. The Decedent's diagonal flat-footed run to the station platform was made at all times in full and unobstructed view of the trainmen. But two conclusions can be drawn—(a) Decedent approached the station platform from the street as the *shortest diagonal distance* and (b) from that point he moved in a *direct straight line*, at right angles to the rails where the train was standing at rest. The trainmen, if they had performed their duty in looking in the direction approaching passengers would take, must have seen the Decedent. Certainly the Court may not conclude as law and the jury, on any facts in evidence, would not be warranted in finding as fact that Decedent suddenly emerged from any "screened" place that obstructed the clear view of the trainmen.

(3)

Respondent says, on page four:

> "Petitioner likewise failed to show accurately how far the train moved before O'Daniel tried to board it and how far his 'couple of steps' (R. 25a, 26a, 27a) took him alongside the train before he fell."

If there is one thing established to certainty, it is the distance the car had moved at the time the Decedent attempted to board it. Miss Vaux testified the rear platform of the car, which the Decedent attempted to board, stopped at approximately ten (10) feet from the East end of the station building and that the Decedent attempted to board this platform when it was on a line with the East end of the station building.

Above all, the following colloquy between the Trial Judge and one of the counsel for Petitioner, on motion made to call Miss Vaux for the purpose of having the record in accord with that fact, precludes even a suggestion being made as to any uncertainty or inaccuracy about the distance the car moved (45a, 46a).

> "MR. DICKERSON: 'How far from the east end of the station building did that rear platform stop?' *She said, ten feet.*
>
> THE COURT: *Yes.*
>
> MR. DICKERSON: That is what we are contending.
>
> THE COURT: Then, what do you want?
>
> * * * * * * *
>
> MR. DICKERSON: Pardon me, Your Honor, the witness has testified that the distance from *the rear end of the third car, from which she alighted, to the east end of the platform, is ten feet.*
>
> THE COURT: *Yes, certainly.*
>
> MR. DICKERSON: She further testified that the

decedent ran along in a straight line at the east end of the station *and went directly to the north edge of the platform, and stood at that point until the steps, to which she has just referred, came opposite him.*

THE COURT: *Yes.*

MR. DICKERSON: *And that is the distance which the car moved, according to her testimony, when he attempted to board the car.*"

The above colloquy occurred after counsel for the Petitioner stated that (42a):

"MR. VALE: May it please the Court, before Your Honor rules on the motion made by counsel for the defendant to dismiss, I wish to make a motion on behalf of the plaintiff, that the plaintiff be accorded the privilege of reopening her case for the purpose of calling a witness, Miss Vaux, who is now in court, to supply certain testimony which she gave while on the stand, and which, by inadvertence by the stenographer, is omitted from his notes."

The official stenographer then, for the first time, read from his notes the testimony of Miss Vaux as follows (45a):

"Q. How far from the east end of the station building did that rear platform stop?

A. Approximately ten feet."

Whereupon counsel for Petitioner advised the Court (46a):

"MR. VALE: If that is in the record, may it please the Court, and there is no misunderstanding as to that.

THE COURT: I do not think there is any misunderstanding.

MR. VALE: Then, that is the end of it."

(4) and (5)

Other erroneous statements are summarized as follows: There is neither (4) evidence that all passengers on the station platform had boarded the train before Decedent reached the station platform; nor

(5) Presumption that the starting signal was heard by Decedent—a question of fact to be determined by the jury. See in this connection: ~~To be listed in Table Cases~~. Pennsylvania Railroad Company vs. Werner ((1879) 89 Pa. 59).

ERRORS IN ARGUMENT.

Respondent's erroneous statements and applications of principles of law should be corrected as to matters following:

(1)

Respondent on page five (5) of its Reply Brief refers to MacGregor vs. State Mutual Life Assurance Company of Worcester, Mass. ((1941) 315 U. S. 280, 86 L. ed. 846), to support its suggestion that because the Trial Judge and two of the Circuit Judges below had experience at the Pennsylvania Bar, the judgment should not be disturbed. Respondent, however, does not refer to the irrefutable reason the MacGregor judgment was left undisturbed, for this Honorable Court tersely distinguished the facts in that case from the instant case by stating at page 281:

> *"No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention."*

There is no Pennsylvania case that conceptually applies the assumed absolute which both the Trial Court and the

Circuit Court made decisive in the instant case. The cases cited by the Trial Court in its opinion and by Respondent in its Reply, as therein it now admits, *are but dicta.* Every case referred to by Respondent makes *all* of the circumstances attending the particular injury determinative of liability, where the train was just starting and speed was negligible or was not definitely fixed by indubitable testimony at four or more miles per hour.

The Johnson Case and precedents relied on by Petitioner demonstrate the applicability of the principles therein stated as conclusive of the Trial Court's error in the instant Petition.

(2)

On page six (6) of Respondent's Brief, it now is frankly admitted that in order to sustain the conceptualistic interpretation of negligence per se, it must in part, at least, rely on *"the court's dictum"*.

As was pointed out in Petitioner's Brief at pages seventeen (17) and eighteen (18), every case relied upon by the Court below and differentiated in the Petition discloses a factual basis showing: (a) speed in excess of three or four miles per hour, (b) proximate cause of injury was the sole act of the injured party, and (c) undisputed facts from which only one inference of contributory negligence could be drawn. Not a case cited by the Court or Respondent of negligence per se concluded as law against a decedent's attempt to board a train just starting and moving at so negligible speed no witness attempted to guess.

(3)

Respondent's Reply Brief on page seven (7) quotes a short excerpt from the dissent of Mr. Justice Mestrezat in the Hunterson Pennsylvania Case. A most casual reading

of this case will disclose that it announces the law and supporting reasons as here contended by the Petitioner. The excerpt quoted by the Respondent only states that injury of which plaintiff's negligence is the sole proximate cause precludes recovery, regardless of speed. The excerpts from the dissenting opinion in confirmation of Petitioner's contention follow:

At page 573:

> "It will be observed that the testimony is somewhat conflicting as to the rate of speed at which the car was travelling when the plaintiff attempted to board it. The jury would have been *justified in finding that the car was moving slowly and had almost absolutely stopped.* It was not for the court to resolve the apparently conflicting statements of the witnesses as to the speed of the car at the time the plaintiff attempted to enter it. That was for the jury."

On page 574, the learned Justice says:

> *"In my judgment, it is not negligence per se to board a moving train";*

and finally, on page 576, the reasons in support of that conclusion are stated:

> "A reasonably prudent man would not attempt to get on or off a rapidly moving street car as the danger would be apparent, and if he did so his act would convict him of negligence; but should he enter or alight from a car almost at rest, the circumstances would be different, and the character of his act must be determined in the light of those circumstances. *In the former, the rapidity of the car would make the danger apparent to the dullest intellect; in the latter, the speed of the car would raise no doubt in the mind of a prudent man that he could accomplish the act with safety.*
>
> *The position of the majority of the court is not sup-*

ported by any decision in this state. On the contrary, the authorities not only of this but of other states, sustain the view herein stated."

(4)

Respondent's Reply Brief, page nine (9) states there was no emergency; but that Decedent's peril resulted from a voluntary choice. This contention is no answer to the principles announced and applied in the Johnson Case and in other Pennsylvania and Federal cases which follow it. Respondent's cited precedents involve the principle of *peril based upon factual situations wherein the Petitioner voluntarily placed himself in a hazardous position*, and where the proximate cause of injury solely resulted from his acts.

(5)

On page nine (9) of its Reply Brief, Respondent complains and now suggests Petitioner should not have exercised her legal right to sue in a Federal court, and referring to the Pennsylvania case of Reddington vs. Philad. Traction Company ((1890) 132 Pa. 154), contends Petitioner basis her argument in support of the issues involved on theories a half century old. Both the lower and appellate court emphasized as controlling the fact that Reddington, having disabled himself by attempting to get on the car *with his left arm and hand encumbered with his coat and dinner bucket*, he had *thus prevented himself from doing what he might otherwise have done without being charged with carelessness.* On page 115, the Trial Judge says:

> "If he could have taken hold of the upright with his left hand, then, in all probability, he would not have been thrown off as he was. *It was the disabling of himself which prevented him from doing, under the circumstances, what he otherwise might have done.*"

(6)

The opening sentence of Respondent's argument (page 5) suggests: "No federal question is raised by the petition". The succeeding sentences of the argument make clear, however, that it is the Court's departure from the usual course of Federal procedure which requires this Honorable Court to exercise its appellate supervision. The principles referred to and the cases wherein they were applied are discussed on pages six (6) and seven (7) of the Petition and on pages nine (9), eleven (11), twelve (12); twenty-nine (29) to thirty-six (36); forty-one (41) to forty-four (44) of the argument, with particular reference to the meaning of and the respective functions of judges and juries under Rule 50 of the Federal Rules of Civil Procedure.

All of which is respectfully submitted.

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